IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

COSTA & GRISSOM MACHINERY COMPANY, INC. and COSTA LEVIGATRICI, S.p.A.,	)	
Plaintiffs,	)	CIVIL ACTION FILE
v.	)	NO. 1:08-CV-2948 (CAP)
QINGDAO GIANTWAY MACHINERY CO., LTD. and LOBO MACHINERY CORPORATION,	)	
Defendants.	)	

JOINT MOTION TO VACATE SANCTIONS ORDERS
AND BRIEF IN SUPPORT THEREOF

Pursuant to Rule 60(b) and/or Rule 54(b), and as contemplated in *Mahone v. Ray*, 326 F.3d 1176 (11th Cir. 2003), the parties jointly file this Motion to Vacate this Court's March 24, 2009 Order [Doc. 80], December 2, 2009 Order [Doc. 154], and June 6, 2010 Order [Doc. 190] (the "Sanctions Orders"), showing the Court as follows:

I. INTRODUCTION

In June 2010, Cary Ichter ("Ichter") and Adorno & Yoss, LLC ("Yoss"), former counsel to Plaintiffs, filed Notices of Appeal of the Sanctions Orders with the Eleventh Circuit Court of Appeals. [Docs. 191, 194]. On October 19, 2010, Defendants-Appellees filed a Motion to Stay Ichter's Appeal. Neither Ichter nor Yoss opposed Defendants-Appellees' Motion to Stay the Appeal, which was granted by the Eleventh Circuit Court of Appeals on November 19, 2010.

As required by Eleventh Cir. R. 33-1, the parties participated in mediation. As a result of this mediation, a confidential agreement in principle to settle this case was reached on December 27, 2010, and the confidential Settlement Agreement (the "Settlement Agreement") became final and binding upon the parties on December 30, 2010.[1] Pursuant to the Settlement Agreement, the parties agreed to jointly move this Court to vacate its Sanctions Orders. Pursuant to the

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[1] The tentative settlement agreement became final and binding upon the parties on December 30, 2010, upon compliance by Ichter and Yoss LLC (the successor to Adorno & Yoss, LLC) with certain conditions precedent required under the terms of the Tentative Settlement Agreement. The final December 30, 2010 Settlement is referred to herein as the "Settlement Agreement."

Settlement Agreement, the parties have also agreed that, if the Court vacates it Sanctions Orders, Ichter and Yoss will dismiss their pending appeals.[2]

The parties respectfully request that this Court enter an Order vacating the Sanctions Orders or, if the Court believes the filing of appeals has deprived it of jurisdiction to enter such an Order, the parties request that the Court enter an Order stating that it would be inclined to grant a Motion to Vacate the Sanctions Orders if the Eleventh Circuit Court of Appeals remands this case for that purpose. Vacating the Sanctions Orders would obviate the need for the pending appeals, thus promoting judicial economy. Vacating the Sanctions Orders would also further the parties' private interests by eliminating the financial burdens and risks of a lengthy appeal and mitigating the serious reputational injury to Plaintiffs' former counsel.

[2] Defendants renew their request set forth in Defendants' counsel Donald R. Andersen's letter of January 4, 2011 for consideration and entry of the previously submitted proposed Consent Judgment Regarding Wrongful Seizure Claims [Docket No. 228, Exhibit 1] and Consent Order of Dismissal of Defendants' Counterclaims II through VI and Plaintiffs' Trade Dress Claims [Docket No. 228, Exhibit 3]. As set forth in the same letter, the sanctions issues have now been settled and there is no longer a need for this Court to enter a Final Judgment as to the amount of the sanctions. Instead, Defendants have agreed to join this request that the sanctions orders be vacated for the reasons set forth herein.

Furthermore, no countervailing public interests support preserving the Sanctions Orders. The public interest in finality is not implicated by vacatur of the Sanctions Order because, as the Court has recognized, no Final Judgment has been entered in this matter. [Doc. 230 – Pg. 2 n.1]. Also, the Sanctions Orders are premised on a fact-sensitive issue and do not implicate unsettled law. Therefore, the public interest in the development of decisional law would not be advanced by preservation of the Sanctions Orders.

Finally, the Sanctions Orders do not further the public interest in deterring abusive litigation. The Settlement also imposes sizeable financial penalties on Plaintiff's former counsel and any additional deterrence accruing from the preservation of the Sanctions Orders is unnecessary. At the same time, the Settlement constitutes an implicit recognition by Defendants-Appellees that Ichter and Yoss have presented good faith legal issues that could result in the Eleventh Circuit Court of Appeals reversing the Sanctions Orders.

Finally and importantly, the parties are satisfied with this result and wish to put this matter behind them. The parties submit that this consideration should be entitled to substantial equitable weight. For these reasons, this joint Motion is due to be granted.

II. ARGUMENT AND CITATION TO AUTHORITY

A. The Court May Entertain the Instant Motion.

This Court may entertain this Motion despite the pendency of Ichter and Yoss' appeals. "As a general matter, the filing of notice of appeal deprives the district court of jurisdiction over all issues involved in the appeal." *Mahone v. Ray*, 326 F.3d 1176, 1179 (11th Cir. 2003). A district court, however, may take action "'in furtherance of the appeal.'" *Id*. (quoting *Lairsey v. Advanced Abrasives Co*., 542 F.2d 928, 930 (5th Cir. 1976)). Thus, while a district court does not have jurisdiction after the filing of a notice of appeal to grant a Rule 60(b) motion, a district court "presented with a Rule 60(b) motion following the filing of a notice of appeal has been filed should consider the motion and assess its merits. It may then deny the motion or indicate its belief that the arguments raised are meritorious. If the district court selects the latter course, the movant may then petition the court of appeals to remand the matters so as to confer jurisdiction on the district court to grant the motion." *Id*. at 1180.

The Sanctions Orders may be vacated pursuant to Rule 60(b) because they are final. Ichter and Yoss' liability has been established, and the June 6, 2010 Order sets a minimum sanction award at the fixed amount of $311,836.32. Of course, the amount of reasonable fees, costs, and expenses incurred in litigating the reasonableness of the $311,836.32 award is not fixed, but vacating the Sanctions Orders would moot this issue.

Even if this Court concludes the Sanctions Orders are interlocutory, it may still indicate its willingness to vacate the Sanctions Orders, if this case were remanded, pursuant to Rule 54(b).[3] *See, e.g.*, *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1315 (11th Cir. 2000) (stating district court has plenary power to reconsider, revise, alter or amend interlocutory orders); *Brogdon ex rel. Cline v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000) (identifying Rule 60(b) and 54(b) as alternative bases for motion for reconsideration, with later allowing a district court to "modify or vacate non-final orders at any point prior to final judgment").

While *Mahone v. Ray*, cited above, discusses only Rule 60(b) motions, it does so because it contemplates that a notice of appeal would have been filed for a final order only. Where a notice of appeal has been filed for an interlocutory order, the same procedure should still be appropriate "to prevent one court's stepping on the toes of the other, which would waste judicial time as well as forc[e] the parties

[3] Rule 54(b) states in pertinent part as follows: "[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

to proceed in two courts in the same case at the same time." *See Boyko v. Anderson*, 185 F.3d 672, 674 (7th Cir. 1999).

B. The Court Should Grant the Instant Motion.

Under Rule 60(b)(6) of the Federal Rules of Civil Procedure, "[o]n motion and on such terms as are just, the court may relieve a . . . party's legal representative from a[n] . . . order . . . for . . . any other reason that justifies relief." Rule 60(b)(6) is "'a grand reservoir of equitable power to do justice in a particular case'"[4] and thus confers broad discretion on a trial court to grant relief. *See United States v. Certain Real Prop. Located at Route 1*, *Bryant, Ala.*, 126 F.3d 1314, 1318 (11th Cir. 1997) (quoting *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984)). In exercising this discretion, the trial court may grant relief "upon a showing of exceptional circumstances." *Id.* (quoting *Griffin*, 722 F.2d at 680).

The standard for reconsideration of an interlocutory motion is essentially equivalent to the standard for reconsideration of a final order pursuant to Rule 60(b)(6), if not even more permissive. *See, e.g.*, *Watwood v. Barber*, 70 F.R.D. 1, 8 (N.D. Ga. 1976) (a decision whether to afford relief from an interlocutory order is "'left subject to the complete power of the court . . . to afford such relief . . . as

[4] Relief pursuant to clauses (1)-(5) of Rule 60(b) is not warranted given their plain meaning, and arguments properly addressed pursuant to those clauses are not made herein.

justice requires'"); *Hornor, Townsend & Kent, Inc. v. Hamilton*, No. Civ. A.1:01-CV-2929-J, 2004 WL 2284503, at *4 (N.D. Ga. Sept. 30, 2004) ("At any time before final judgment, a district court may modify, rescind, or vacate an interlocutory order" subject only to the exercise of sound discretion); *Canaday v. Household Servs., Inc.*, 119 F. Supp. 2d 1258, 1260 (M.D. Ala. 2000) (trial court may reconsider or reverse interlocutory order "for any reason it deems sufficient") (citing *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 862 (5th Cir. 1970)).

Under either standard, exceptional circumstances exist here and warrant vacating the Sanctions Orders.

1. The Public Interest Weighs in Favor of Vacating the Sanctions Orders.

Vacating the Sanctions Orders would promote judicial economy by facilitating the Settlement, which was freely and voluntarily agreed to by the parties following arms-length negotiations. An essential consideration in connection with the Settlement was the submission of this Joint Motion to the Court. Indication by this Court of its intention to vacate the Sanctions Orders because of the Settlement would enable the parties to seek an order from the Eleventh Circuit Court of Appeals remanding this matter to this Court for the purpose of effectuating the Settlement.

If the Sanctions Orders are not vacated, Ichter will feel compelled to continue his appeal, given the devastating reputational injury that the Sanctions Orders entail. Not only would the pending appeals consume the scarce time and energy of the Eleventh Circuit Court of Appeals, but a reversal and remand would further require an expenditure of this Court's time. This has been recognized by many courts as a compelling consideration:

> [a]llowing vacatur in this case would allow the Court and the parties to avoid the further expenditure of valuable time and resources. This case already has a long and tortured history . . . . 'The courts have undeniably been more flexible when vacatur would bring an end to the tortured history of a litigation, opening the door to settlement by relieving some party from having to fight an undesirable ruling on appeal.'

BMC, LLC v. Verlan Fire Ins. Co., No. 04-CV-0105A(SC), 2008 WL 2858737 (W.D.N.Y. July 22, 2008) (quoting *Barry v. Atkinson*, 193 F.R.D. 197, 200 (S.D.N.Y. 2000)).

Several courts have found the facilitation of a settlement that would obviate the need for a pending appeal to be an exceptional circumstance warranting vacatur pursuant to Rule 60(b). *See, e.g.*, *Major League Baseball Props. v. Pacific Trading Cards, Inc.*, 150 F.3d 149, 151 (2d Cir. 1995) (approving vacatur where doing so "was a necessary condition of settlement"); *Am. Home Assurance Co. v. Kuehne & Nagel (AG & CO.) KG*, No. 06-CIV-6389(JLC), 2010 WL 1946718, at

*2 (S.D.N.Y. 2010) (indicating willingness to grant vacatur if case was remanded because "[t]he private interests of the parties in settling this case outweighs any public interest in preserving the finality of the judgment and the development of decisional law"); *Equal Access for All, Inc. v. Hughes Resort, Inc.*, No. 5:04-CV-178/MCR, 2006 WL 1313189, at *2 (N.D. Fla. May 12, 2006) (granting motion to vacate judgment because, *inter alia*, "given that this action is on appeal, both the judiciary and the parties would save time and resources if the motion were granted"); *United Nat'l Ins. Co. v. Airosol Co., Inc.*, No. 99-1236-JTM, 2001 WL 34664157, at *1 (D. Kan. Feb. 21, 2001) (finding " 'exceptional circumstances' to justify exercise of discretion in vacating its prior rulings and judgment in order to facilitate settlement").

It is true that the Supreme Court has held mootness by reason of settlement does not by itself justify vacatur of a judgment under appellate review because, *inter alia*, of the risk of discouraging settlement at an earlier stage. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 20 (1994). But the Supreme Court made this determination in the aggregate, concluding "[w]e find it quite impossible to assess the effect of our holding, either way, upon the frequency or systemic value of settlement." *Id.* Other courts in other cases have recognized that, as here, "the negative impact [of denying vacatur] on settlement is absolutely clear." *Motta v. District Director of Immigration & Naturalization Servs.*, 61 F.3d 117 (1st Cir. 1995) (vacating district court's judgment in light of settlement and remanding with directions to dismiss case as moot). Denial of the Motion will mean the appeals must go forward and the case must continue, although the parties have settled their disputes.

2. No Countervailing Public Interest Exists.

While vacating the Sanctions Orders would promote judicial economy, preserving them would not promote any public interest. First, no systemic interest in finality is implicated because this Court has not entered Final Judgment. Consequently, *Bancorp*, and its progeny, are largely inapposite.

Second, these specific Sanctions Orders, while reflecting important and fundamental principles and applying them the facts of this case for the purpose of assuring the integrity of the proceedings before this Court, do not announce new principles or address a systemic problem presented in our legal system. Clearly, there is a public interest in deterring bad faith litigation, but the Sanctions Orders do not break new ground in that area of the law. Instead, the Sanctions Orders rely upon established legal doctrine and are entirely dependent on a specific and unique set of facts. Consequently, vacating the Sanctions Order would be unlikely to have an adverse effect on establishing law for future litigants or courts involved in "similar" disputes, which will turn on entirely different fact patterns and non-novel questions of law.[5]

Furthermore, the Settlement itself is an implicit admission by Defendants-Appellees that the Eleventh Circuit Court of Appeals could find a basis for reversing the Sanctions Orders.

The public interest is best served by vacating the Sanctions Orders, which will not be of great importance or precedential value in other cases not presenting the same, unique facts. Additionally, to the extent this Court is prepared to conclude that Plaintiff's former counsel have an intrinsic propensity to abuse the federal judicial system, the Settlement has exposed them to stiff personal and organizational financial penalties agreed to under the Settlement. The parties jointly represent that the public interest is served by the Settlement of the sanctions claims in this case.

[5] In contrast, the Sanctions Orders are highly significant to the parties involved, despite their lack of precedential value. The Sanctions Orders conclude that Ichter and Yoss acted in bad faith. Such statements have had, and will continue to have, enormous and profound implications on the lives, not merely the livelihoods, of Plaintiffs' former counsel. While vacating the Sanctions Orders will not eliminate the stain of negative publicity that has attended them, vacating the Orders would mitigate somewhat the persistent and profound impact the Order have had on the reputations and lives of counsel.

2. The Private Interest Weighs in Favor of Vacating the Sanctions Orders.

The private interest of Plaintiff's former counsel is apparent. The Sanctions Order make a "symbolic statement about the quality and integrity of an attorney's work — a statement which may have tangible effect upon the attorney's career." *Simmerman v. Corino*, 27 F.3d 58, 64 (3d Cir. 1994. The reputation of Ichter and Yoss are at stake – reputations built over many, many years, through hard work, dedication, and perseverance. The enormous and profound implications that such findings will have on the **lives, not merely livelihoods**, of Plaintiffs' counsel are entitled to due weight. *See, e.g.*, *Microsoft Corp. v. Bristol Tech., Inc.*, 250 F.3d 152, 156 (2d Cir. 2001) (vacating order imposing punitive damages and noting a relevant equitable consideration was "that some individuals . . . are the subject of moral appraisals"); *Taylor v. Miller*, No. CIV-05-49-C, 2007 WL 927937 (W.D. Okla. Mar. 26, 2007) (vacating judgment including punitive damages against police chief for excessive force in Section 1983 action in light of settlement and harm to defendant's career).

Equitable considerations should weigh in favor of vacating the Sanctions Order because the parties' voluntary and mutual settlement should be the preferred mechanism for resolving their dispute.

> To be sure, it can be argued that depriving the public and the judicial system of the precedential value of the district court's opinion works a kind of harm. But . . . such a species of harm [is not] entitled to take priority over the parties' best interests. Placing the former above the latter would be inequitable.

Motta v. District Director of Immigration & Naturalization Servs., 61 F.3d 117, 118 (1st Cir. 1995).

IV. CONCLUSION

The parties respectfully request that this Court enter an Order either vacating the Sanctions Orders, if the Court has jurisdiction to do so, or an Order stating that it would be inclined to grant this Motion if the Eleventh Circuit Court of Appeals remands this case for that purpose. Exceptional circumstances warrant vacating the Sanctions Order. Vacating the Sanctions Order would promote the public interest in judicial economy and further the parties' private interests by eliminating the financial burdens and risks of a lengthy appeal and remedying serious reputational injury to Plaintiffs' former counsel.

Furthermore, no countervailing public interests support preserving the Sanctions Orders. No Final Judgment has been entered in this matter; therefore, the public interest in finality is not implicated by vacatur. The Sanctions Orders are premised on a fact-sensitive issue of settled law, and the public interest in the development of decisional law is therefore not advanced by preservation of the

Sanctions Orders. The Sanctions Orders are not otherwise required in order to further the public interest in deterring abusive litigation for the reasons stated herein.

Respectfully submitted this 19th day of January, 2011.

Prepared by:

s/ Cary Ichter
Cary Ichter
Georgia Bar No. 382515
cichter@ichterthomas.com
Ichter Thomas, LLC
3340 Peachtree Road NE
Suite 1530
Atlanta, Georgia 30326
T: (404) 869-7600
F: (404) 869-7610

Former Counsel for Plaintiffs

Consented to by:

s/Donald R. Andersen
Donald R. Andersen
Georgia Bar No. 016125
dandersen@stites.com
Stites & Harbison PLLC
2800 SunTrust Plaza
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
T: (404) 739-8800
F: (404) 739-8870

Attorney for Defendants

s/ Matthew D. Williams
Matthew D. Williams
Georgia Bar No. 763210
mwilliams@yoss.com
Yoss LLC
1349 W. Peachtree St. N.E.
Suite 1530
Atlanta, Georgia 30309
T: (404) 347-8300
F: (404) 601-4599

Attorney for Appellant Yoss LLC

CERTIFICATIONS

I hereby certify, pursuant to LR 7.1(D), NDGa., that the foregoing **JOINT MOTION UNDER FED. R. CIV. P. 60(b)** was prepared using size 14 Times New Roman font as required by LR 5.1(C), NDGa.

This 19th day of January, 2011.

/s/ Donald R. Andersen
Donald R. Andersen
Georgia Bar No. 016125

I hereby certify that a copy of the foregoing **JOINT MOTION UNDER FED. R. CIV. P. 60(b)** was served with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the attorneys of record, this 19th day of January, 2011.

/s/ Donald R. Andersen
Donald R. Andersen
Georgia Bar No. 016125